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PATENT  
Attorney Dkt. No. 023070-114410US  
Client Ref. No. 2001-094-1

TOWNSEND and TOWNSEND and CREW LLP

By: *Oliver*

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

In re application of:

KROCHTA, ET AL.

Application No.: 09/879,794

Filed: June 11, 2001

For: METHODS OF REDUCING  
FRIABILITY OF CEREAL PRODUCTS,  
POTATO CHIPS, AND FREEZE-DRIED  
FOODS, OF INCREASING BOWL LIFE  
OF CEREAL PRODUCTS, AND OF  
DELAYING RANCIDITY OF NUTS

Confirmation No.: 3739

Examiner: Paden, Carolyn A.

Art Unit: 1761

PRE-APPEAL  
BRIEF REQUEST  
FOR REVIEW

Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Sir:

In response to the Final Office Action mailed October 23, 2006, regarding the above-referenced application, Applicants hereby submit this Pre-Appeal Request for Review. Also filed herewith are a Notice of Appeal, a Request for Pre-Appeal Brief Review, and a Petition with fee authorization for an extension of time until the present date.

**The Invention**

The pending claims relate to the surprising discovery that (i) contacting cereal products (such as ready to eat cereals) with water for a time sufficient to hydrate the surface but not the interior and then drying the cereal product to its original water content improves the time the bowl life of the cereal product, (ii) that contacting a potato chip or freeze dried food with water for a time sufficient to hydrate the surface but not the

interior and then drying the chip or food to its original water content reduces the tendency of the chip or freeze dried food to crumble (more scientifically stated as reducing its "friability"), and (iii) that contacting a shelled nut with water that does not contain a preservative and without boiling the nut and promptly drying the nut to its original water content increases its shelf life. The specification explains that it is surmised believed that the brief hydration of the surface causes pores on the surface to close, thereby prolonging the bowl life of the cereal product, reducing the friability of a chip or freeze-dried food, and reducing the ability of oxygen to penetrate a shelled nut, thereby increasing its shelf life. See, e.g., specification, at page 5, lines 16-19.

## **The Rejections and Applicants' Responses Thereto**

### **1. Rejection of claims 1-16 over Bear**

Claims 1-16, the claims to treatment of cereal products, are rejected under 35 U.S.C. § 103(a) as obvious over Bear and Bear, HOW TO REPAIR FOOD, (Ten Speed Press, Berkeley, CA 1998) (hereafter "Bear"). The Office Action dated April 6, 2006 (the "April Action"), stated that Bear teaches treating soggy cold cereal at 350 °F for 2-3 minutes to recrisp it. The Action further asserted that Bear did not state the extent of hydration, but that "an ordinary muggy day would not be expect[ed] to fully hydrate the interior of the cereal product." April Action, at page 2. Applicants responded, in their Amendment dated August 7, 2006, that by pointing out that Bear in fact states that the cereal left "open on the muggiest day of the year . . . is limp and soggy," and that the cereal could only be "limp" if it had been hydrated throughout to lose its firmness. August Amendment, at page 7.

The current Office Action, dated October 23, 2006 (the "October Action"), does not refute this point, but asserts that "it would have been obvious to modify the heat treatment conditions of Bear to treat the less hydrated cereals. It is not seen that the reference prevents the reader from modifying the time and temperature treatments according to the condition of the cereal." October Action, at page 2.

The obviousness rejection of claims 1-16 suffers from a glaring problem. Claims 1-16 recite contacting the cereal product with water or steam, and then drying the cereal product. Bear teaches the reader how to "repair" cereal that has lost its crispness due to humidity, but does not teach or suggest to the reader that the cereal product should be contacted with water or steam to cause it to lose its crispness. Bear therefore does not teach or suggest every element of the claims as presented. Nor can the teachings of the reference be modified to recreate the "contacting" step of the claims. Bear clearly considers cereal that has lost its crispness to be undesirable. Neither the April Action nor the October Action explain why a person reading Bear would be motivated to modify the reference by contacting the cereal product with water or steam and presumably thereby lose its crispness, before engaging in the "repair" step of drying it. Accordingly, Applicants respectfully maintain that the obviousness rejection of claims 1-16 fails to present a proper prima facie case of obviousness.

## **2. Rejection of Claims 16-20 over Bear and Matz**

The October Action rejects claims 16-20 over Bear, above, in view of Matz, FOOD TEXTURE (AVI Publishing Co. Westport CT 1962) (hereafter "Matz"). The April Action states that Bear discloses re-crisping soggy potato chips by either treating them in a broiler or microwaving them on high, while the October Action states that it would be obvious to modify the time and temperature of the treatment of the chips to achieve the desired degree of friability. October Action, at pages 2-3.

This rejection, like the rejection of claims 1-16 over Bear, suffers from the problem that Bear does not teach or suggest that it would be desirable to contact the chip with water or steam. Nor can the teachings of the reference be modified to recreate the "contacting" step of the claims. Bear clearly considers chips that are soggy to be undesirable. Neither the April Action nor the October Action explain why a person reading Bear would be motivated to modify the reference by first contacting the chips with water or steam, and therefore make them soggy, before engaging in the "repair" step.

Matz does not make up this deficiency. According to the Actions, Matz teaches that drying a food to a low moisture state would render it less friable. Even if true, this would not explain why the person of skill would be motivated to first contact the chips with moisture, which Bear teaches is undesirable. Accordingly, Applicants respectfully maintain that the obviousness rejection of claims 16-20 fails to present a proper *prima facie* case of obviousness.

### **3. Rejection of Claims 21-31 over Bear in view of Fennema**

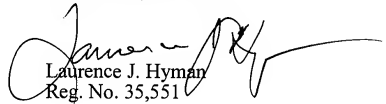
Claims 21-31 are rejected as obvious over Bear, above, in view of Fennema, ed. FOOD CHEMISTRY (Marcel Dekker, Inc, New York, NY (2nd ed. 1985)) (hereafter "Fennema"). The April Action states that Bear discloses treating nuts in boiling water for 3 minutes to remove the skin. April Action, at page 3. Applicants responded by pointing out that the claim as presented excluded boiling the nut, and the teaching of Bear was therefore outside the claim's recitation. The October Action maintained the rejection, observing that Bear also presents treatments for nuts that do not involve boiling: in the first, shells mixed in with nuts are separated from nuts by adding water, and in a second, the problem of nut meats that crumble when shelled is solved by soaking the remaining unshelled nuts in water overnight. October Action, at page 3, citing page 75 of Matz. Both are outside the recitation of the claims, however, which recite that the nuts are shelled, and Fennema does not make up this deficiency, since it merely goes to whether a dried food has a characteristic known as water activity that would retard oxidation. Accordingly, Applicants respectfully maintain that the obviousness rejection of claims 21-31 fails to present a proper *prima facie* case of obviousness.

**CONCLUSION**

In view of the foregoing, Applicants believe that the obviousness rejections should be withdrawn and the claims allowed.

If the reviewers believe a telephone conference would expedite prosecution of this application, please telephone the undersigned at 415-273-4744.

Respectfully submitted,



Laurence J. Hyman  
Reg. No. 35,551

TOWNSEND and TOWNSEND and CREW LLP  
Two Embarcadero Center, Eighth Floor  
San Francisco, California 94111-3834  
Tel: (415) 576-0200  
Fax: (415) 576-0300  
LJH:ljh